I am Bill West from the Bush School of Government and Public Service at Texas A&M University. Thank you for inviting me to testify in commemoration of the 60th anniversary of the Administrative Procedure Act. I am honored to be here.

My testimony today will focus primarily on the results of a recent study of how agencies develop proposed rules. The study was conducted by a team of seven Bush School students that I supervised and that was supported by the Congressional Research Service. Curtis Copeland and Mort Rosenberg of CRS provided invaluable support and guidance for the project. I am also grateful to Daniel Mulhollan, Angela Evans, and Kent Ronhovde for their initiatives in establishing a relationship between CRS and the Bush School. Our study of rulemaking is one of several worthwhile projects that CRS has sponsored at the Bush School and other schools of public affairs.

The Administrative Procedure Act is a venerable statute that has served the nation well. As many have remarked, however, American administrative law was a comparatively new field at the time the APA was enacted and the so-called bureaucratic state was still in its relative infancy. New procedural constraints on agency discretion have been added as the bureaucracy has grown and as new issues of legitimacy and accountability have arisen. Mechanisms for direct oversight of administrative policy making have been added as well. The most important development in this latter regard has been the institutionalization of regulatory review in the Executive Office of the President that has occurred over the past three decades.[1] The various controls that shape the administrative process have been added largely in a piecemeal fashion and perhaps without sufficient consideration of how they all fit

[1]James Blumstein, "Presidential Administration and Administrative Law: Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues," *Duke Law Journal* 51 (2001).

together.

In any case, the 60th anniversary of the APA is an appropriate occasion to consider its effects and its possible limitations. With regard to rulemaking, one might examine the effects of public comment on agency decisions or the impact of judicial review (or the threat thereof) as the meaning of the "arbitrary-or-capricious" standard has evolved. Or one might examine the relationship between the APA's objectives, on the one hand, and centralized executive oversight of rulemaking on the other. Scholars have, in fact, given a good deal of attention to these and other important topics relating to formal, institutional constraints on agencies' exercise of legislative discretion.

At the same time, scholars have practically ignored the informal processes that precede the APA's notice-and-comment requirements and most other controls on rulemaking. This, despite the fact that the most important policy decisions in rulemaking are arguably made as proposals are being developed. I have noted elsewhere that the notices of proposed rulemaking that appear in the Federal Register are usually very specific. Further, they often take years to develop and reflect a substantial investment of agency resources. Important proposals are sometimes accompanied by book-length documents that lay out their legal and empirical premises. Suffice to say that agency officials usually feel that they are on firm ground before they invite public comment, and that the most critical issues in terms of defining problems and eliminating alternative solutions to those problems have at least tentatively been resolved.[2]

This is not to deny the importance of notice and comment. Several recent studies have found that agencies do sometimes alter proposed rules in ways that are consistent with the comments they

[2]William F. West, "Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making," *Public Administration Review* 64: 66-80 (February 2004).

receive.[3] As a matter of perspective, however, it is difficult for agencies to change proposed rules in fundamental ways. An obvious disincentive is sunk organizational costs. Intertwined with this is the fact that the demands of due process may compel agencies to invite additional comments in response to substantial changes, thus lengthening an already protracted process.[4] An irony of rulemaking procedures is that the effort to ensure the viability of public comment by requiring agencies to base their decisions on a record (as the courts have generally done since the 1970s and has Congress has done in some enabling legislation) creates an incentive for agencies to develop proposals that will not need to be changed.

With these observations as a point of departure, the project that we conducted for CRS examines how agencies develop proposed rules. It relies primarily on agency documents, on an electronic questionnaire sent to agency staff involved in the development of a large sample of individual rules, and on telephone interviews with high-level agency careerists with extensive experience in the rulemaking process. As an exploratory study, it addressed three general sets of issues as a way of identifying questions for further research: how are rulemaking initiatives placed on agencies' agendas: how is the rulemaking process managed within and across agencies; and what is the character of outside

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[3]*Ibid*. Also see Steven J. Balla, "Administrative Procedures and Political Control of the Bureaucracy," *American Political Science Review* 92: 663-673 (1998). Marissa Martino Golden, "Interest Groups in the Rulemaking Process: Who Participates? Who Gets Heard?" *Journal of Public Administration Research and Theory* 8: 245-70 (1998). Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy,* 2d. ed. (Washington, D.C.: Congressional Quarterly Press, 2003). Susan Webb Yackee, "Sweet-Talking the Fourth Branch: Assessing the Influence of Interest Group Comments on Federal Agency Rulemaking," *Journal of Public Administration Research and Theory* 26: 103-24 (2006).

[4]West, *supra* note 1. These observations were also confirmed in some of the interviews conducted for the study described in this testimony.

participation in the development of proposed rules. The last of these questions may be especially relevant to the Congress as it considers possible amendments to the APA.

The goals of the APA offer a frame of reference for evaluating participation in proposal development. The Act sought to provide some uniformity across agencies (at least regulatory agencies) as they carried out their quasi-judicial and quasi-legislative responsibilities. By the same token, it sought to ensure a degree of due process that was appropriate for each of these functions. In the case of rulemaking, the "informal" or "notice-and-comment" procedures set forth in section 553 were designed to promote a certain level of rationality as well as transparency and inclusiveness in administrative policy making. The requirements that agencies publish a notice in the Federal Register and solicit comments from any and all interested parties were designed to promote these latter, democratic values.[5]

As many have noted, developments in administrative law over the past three-and-a-half decades have been intended to reinforce these goals. The most important has been the requirement that agencies based their rules primarily on a record. This has resulted in part from provisions in some enabling statutes that supersede the APA and in part from judicial (re)interpretation of the APA's "arbitrary or capricious" standard of review. Although the courts have backed off from the precedents of the 1970s in some respects, the "hard-look" doctrine of review is hardly dead– especially if one compares current practices with those that existed during the first two-and-a-half decades after the APA's passage. Whether instituted by Congress or the courts, the extension of more rigorous due process to rulemaking has been motivated in part by the desire to ensure that bureaucracy consider all

[5]*The Administrative Procedure Act: A Legislative History* (Washington, D.C.: U.S. Government Printing Office, 1946) Senate Doc. 248, 79th Cong., 2d. Sess.

legitimate comments in arriving at policy decisions.[6] This goal became popular as the result of the allegation that agencies were "captured" by special interests.[7]

If many of the most important decisions are made before notice appears in the Federal Register, however, what of the participation that occurs as agencies are developing proposals? How inclusive and transparent is that process? As with most of the other issues we examined in our study, there are no simple answers here. This is largely because agency practices are so diverse with regard to most of the key dimensions of proposal development. Although we had hoped that the data from our electronic survey would allow us to make systematic comparisons of such variation across agencies and policy areas, a low response rate prevented this. Still, our interviews and survey data allow for some important observations that suggest further study and that may ultimately be relevant for institutional reform. Indeed, the observation that such variation exists may be significant in and of itself given the relative standardization of practices within the comment phase of rulemaking.

One thing that we found is that outside participation in proposal development is common. Although it does not always occur, it does occur frequently. Not surprisingly, in fact, a number of the officials we interviewed noted that gathering information from people outside of the agency was frequently indispensable to intelligent decision making. Although participants vary a great deal from agency to agency and from one rule to the next, they can include representatives of industry and other affected interests, public interest groups, and other agencies. The latter might become involved in order

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[6]Colin S. Diver, "Policymaking Paradigms in Administrative Law," *Harvard Law Review* 95: 393-434 (1981).

[7]Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88: 1667-1814 (1975).

to resolve jurisdictional issues or coordinate across programs or to represent the interests of their constituents.

OMB's Office of Information and Regulatory Affairs can also be an important participant in proposal development. Although its level of involvement varies a good deal from one agency to the next, some officials characterized OIRA as the "800-pound gorilla." Its informal role in policy formulation is undergirded by the formal powers it enjoys at a later stage to return for reconsideration proposed rules that are not properly justified or that are inconsistent with the president's agenda. In contrast, there was a near consensus among those we interviewed that, although specific statutory requirements were a very important source of rulemaking initiatives in some agencies, the extent and impact of congressional involvement in the development of proposed rules tended to be quite limited.

Beyond the observation that it occurs and that it can involve various actors, we found that the character of participation varies considerably. The timing of input is one important dimension of variation. Some officials indicated that their agencies communicate with extra-governmental actors throughout proposal development while others indicated that their policy is to terminate communications at an intermediate stage of the process. Among the latter, the most common termination point is after the agency has collected general views about the nature of the problem being addressed and possible solutions to that problem and before it begins to articulate and support a specific policy proposal. The mechanisms of participation also vary a great deal. They range from informal conversations at trade conferences or over the telephone to e-mails and letters to hearings to advisory committees, among various other possibilities. Some agencies even use focus groups on occasion.

A generalization that one can offer about participation in proposal development, however, is

that– unlike notice-and-comment under the APA– *it does not usually occur by general invitation*. Rather, it occurs either at the specific invitation of the agency or at the initiative of the participant. The primary exception to this generalization is when agencies solicit comment from all interested parties through an advanced notice of proposed rulemaking. Yet although the use of ANPRMs varies from one agency to the next, they are never used on a routine or even a frequent basis. Although we did not gather precise data, it appears as if they are employed significantly less than five percent of the time across all rulemaking.

Our interviewees offered several explanations for their reluctance to use advance notices more often. One was that ANPRMs were an additional source of delay in a process that was already slowed by numerous procedural hurdles. This disincentive was sometimes reinforced by pressures from Congress and elsewhere to issue rules in a timely fashion. Another explanation was that advanced notices did not produce any useful information beyond what the agency could obtain by contacting stakeholders individually. Not surprisingly, virtually all of the officials we interviewed indicated that they made assiduous efforts to gather all relevant perspectives, and many expressed confidence that they usually knew who were affected by their rules. In addition, several officials noted that, because it did not occur in response to a specific proposal, comment pursuant to advance notices was too unfocused to be of much value. Two of the senior people we interviewed noted that their agencies' use of ANPRMs had declined in recent years as the result of these factors.

In brief, then, although critical policy decisions are at least tentatively made during proposal development, participation during that phase of rulemaking is not subject to the same institutional guarantees of inclusiveness that the APA provides during the comment phase of rulemaking. Whether

or not this is a problem, much less a problem that Congress should seek to address is a complex issue that involves a variety of considerations. One obvious question is whether agencies are effective in gathering input from all relevant stakeholders during proposal development (or whether participation and influence tends to be confined to the "usual suspects"). To the extent participation during proposal development is not inclusive, another important set of questions have to do with whether the APA's notice and comment requirements redress participatory imbalances during proposal development. Are agencies willing to make substantial changes in proposed rules? Given the resources required for effective comment, moreover, the formal opportunity to offer feedback on proposed rules may have little practical effect in enfranchising those who have not had access to agency decision makers during proposal development. Finally, even if Congress could promote inclusiveness through institutional constraints on proposal development, the potential benefits of such a reform must also be weighed against its costs in terms of administrative efficiency and effectiveness. The officials we interviewed were unanimous in their opinion that requiring advanced notices for all or certain classes of rulemaking would impose undue delay on decision making.

Our study also addressed the related issue of transparency in proposal development. Again, although the APA is silent on the subject, there has been an expectation since the 1970s that agencies base their rules on a record. Given this, almost all of the officials we interviewed indicated that they made available to the public all communications with actors outside of the Executive Branch (including legislators and legislative staff) that occurred after a notice appeared in the Federal Register. In contrast, there was wide variation in pre-notice docketing practices. A high-level official in the general counsel's office of one department indicated that his agency's policy was that practically all

communications with non-executive actors must be recorded. In contrast, another official indicated that his agency did not feel a need to docket any pre-notice communications. In between these two extremes, some interviewees said that their agencies did not docket early communications designed to collect general information about problems but became more conscious of the need to docket communications at the later stages of proposal development. Others indicated that they tended only to docket communications that were material to their proposed rules.

Such wide variation in docketing practices may be attributable in part to the current ambiguity of judicial precedent in this area over the past thirty years. It is also undoubtedly attributable to agency culture and tradition, as well to the preferences key officials. One senior careerist with a good deal of influence over administrative procedures within his department indicated that he favored strict docketing requirements on policy as opposed to legal grounds. Given that most pre-notice participation occurred at the specific invitation of agency officials, he felt that recording such communications was desirable as a way of avoiding perceptions of bias in the process.

As with inclusiveness, the prescriptive issues surrounding transparency are complex and invite further research. If off-the-record communications obviously detract from the openness (and thus perhaps the legitimacy) of proposal development, they may also be desirable in terms of administrative efficiency and effectiveness. Although the officials we interviewed were not as consistent in their opposition to docketing requirements as they were to advanced notices, a number of them indicated that *ex parte* conversations facilitated the kind of information gathering required for rulemaking. As in the legislative process, moreover, on-the-record communications may be inimical to the bargaining and compromise required for the accommodation of competing interests. Although agency officials involved

in rulemaking typically describe it as a "technical" process of ascertaining legislative intent and making sound factual determinations, there is little doubt that it is also frequently a political process that requires "partisan mutual adjustment" among competing interests. (It usually requires only a little prodding in interviews to bring this out.)

Some officials also indicated that off-the-record communications with other agencies and OMB were important for coordination and management among administrative programs. Indeed, any effort by Congress to require the docketing of communications within the Executive Branch would necessarily have to consider the legal implications of such a policy. This observation is underscored by the Supreme Court's sympathy in recent decades for a "unified executive" as a means of rationalizing policy implementation across the federal bureaucracy.[8] Yet while managerial prerogatives within the executive are certainly an important consideration, it is also true that other agencies, OMB, and the White House sometimes act as conduits for private interests in their efforts to influence rulemaking. This is well-documented in the case of OIRA, for example.[9] To some extent, therefore, docketing requirements for non-governmental actors but not for members of the Executive Branch might have the potential to produce a misleading appearance of transparency.

All of this is to say that the development of proposed rules deserves much more attention than it has received. It is the proverbial black box; the part of the iceberg that lies under the water. Again, our study was an exploratory effort designed to identify some the key parameters of variation in the

[8]Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 (2001).

[9]For a recent discussion see William F. West, "The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA," *Presidential Studies Quarterly* 35 (March 2005).

process and to identify important questions rather than to answer them. That was true of our consideration of agenda setting and the management of proposal development as well.

In the case of agenda setting, for example, we found that whereas some agencies' rulemaking consisted primarily or exclusively of discretionary initiatives that derived from various sources (agency staff research, feedback from enforcement officials, suggestions from affected groups, etc.) other agencies' agendas were dominated by non-discretionary (legislatively required) rules. Still other agencies combined the two in various proportions. A systematic, cross-agency study of where ideas for rules come from and of why some ideas become rules and others do not can add a good deal to our understanding of how government works. An examination of agenda setting might also have prescriptive value. In the case of one agency, for example, although non-discretionary rules comprised a minority of its total workload, the fact that they took precedence nonetheless made it difficult to plan and execute a coherent agenda for all rulemaking. The official with whom we spoke felt that more effective communication with Congress could help alleviate this problem.

The management of proposal development is also a fertile area for further investigation. For example, we found that some agencies have highly detailed, formalized procedures whereas others have no written policies to guide the process. The degree to which key decisions in the formulation of proposed rules is centralized at the departmental level also varies a good deal. To observe that such variation exists naturally suggests the questions of why it exists and what difference it makes in terms of agency performance.

There are many other important dimensions of proposal development that have received little if any attention. For example, what are the forms and roles of advisory committees and to what extent do

these bodies provide effective representation for stakeholders? Another important set of questions concerns whether and how rulemaking is coordinated across agencies. The list could go on.

This is not to say that studying proposal development is easy. Evaluative and prescriptive analysis is complicated at the conceptual level by the fact that we expect different qualities in the rulemaking process. Given its legislative nature, we naturally want it to reflect the democratic values of openness and balanced responsiveness. Given its administrative nature, we also want it to be carried out in as timely and efficient a manner as possible. A third criterion, which might labeled "substantive rationality," is the expectation that rulemaking decisions be objective and based on rigorous empirical evidence. All of these criteria are legitimate bases for assessing proposal development (and rulemaking more generally). As might be evident from the preceding discussion, however, they all potentially conflict with one another in critical ways.

Data collection presents another, more practical challenge to the study of proposal development. Because of its extreme diversity, studies that focus on one or a few cases are of limited value in developing generalizations. Conversely, gathering process-related data for a large sample of rules can be a daunting task. As we found, for example, efforts to accomplish this goal through surveys of agency personnel face several obstacles, not the least of which is the inherent reluctance of bureaucracy to share information. Indeed, two agencies ordered their staff not to comply with our survey despite (or perhaps because of) a cover letter indicating that it was being conducted under the auspices of CRS and the Judiciary Committee. Even the senior officials we interviewed, all of whom were extremely helpful, were sometimes unable to share internal documents describing the rulemaking process.

Still, the research needs to be done. Gaining a better understanding of the administrative process is an essential foundation for sound institutional policy. Again, I am grateful for the opportunity that you and CRS have given us to explore one broad dimension of rulemaking and I also applaud other recent initiatives to shed more light on topics such as e-rulemaking and the use of advisory committees.

As an editorial observation, let me close by stressing the need to devote more resources to policy and legal analysis in these and other areas of the administrative process. For years, the Administrative Conference of the United States produced studies by first-rate scholars that were of considerable practical as well as academic value. Because it was clearly non-partisan and free of organizational ties that might otherwise bias its analysis, ACUS enjoyed the kind of access to agencies that is necessary for studying many of the most important issues in the administrative process. I am happy that ACUS has been re-authorized, and I would like to join the more distinguished individuals who have argued that it should be funded as well. This would produce substantial benefit for relatively little cost.

Thank you.